Supreme Court, U.S.
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No. 01-1547

In the Supreme Court of the United States

SOUTH CAMDEN CITIZENS IN ACTION, ET AL.,
Petitioners,

v.

THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL.,
Respondents,

ST. LAWRENCE CEMENT CO., L.L.C.,
Intervenor-Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONERS' REPLY TO RESPONDENTS BRIEF IN OPPOSITION

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I. THE COURTS OF APPEALS ACKNOWLEDGE THE SPLIT IN CIRCUITS WHICH RESPONDENTS DENY.

Although the Respondents deny that there is any split in the Circuits over the standard to be used in determining the enforcement of regulations under Section 1983, the Courts of Appeals themselves acknowledge the differing standards. The Eleventh Circuit, for example, is far from "in complete accord" with the Ninth Circuit as claimed by Respondent St. Lawrence (Br. n.6). In Kissimmee River Valley Sportsman Ass'n v. City of Lakeland, 250 F.3d 1324 at n.4 (11th Cir. 2001) the Eleventh Circuit, rejecting the decision in Buckley v. City of Redding, Cal., 66 F.3d 188 (9th Cir. 1995) enforcing a regulation based solely on the Section 1983 right created by the statute and a valid implementing regulation, wrote: "This is the very approach rejected [by the Eleventh Circuit] in Harris." It then went on to refuse to enforce the very same regulation by finding that the regulation was not closely enough related to the statutory right. It was this additional requirement -- that beyond being a valid regulation, the regulation must also explicate an existing statutory right-- that was critical to the result in the Third Circuit here. It is the absence of that additional requirement on the part of the Ninth, Sixth and District of Columbia Circuits which is the basis for the split.

The Third Circuit itself forthrightly stated in the decision below that it was disagreeing with the approach of the Sixth Circuit in Loschiavo v. City of Dearborn, 33 F.3d 548 (6th Cir. 1994), cert. denied, 513 U.S. 1150 (1995). ("courts of appeals are split," 32a; "we reject the Loschiavo approach" 36 a.) The contrary result on the same Title VI regulations in Lucero v. Detroit Public Schools, 160 F.Supp. 2d 767 (E.D.Mich. 2001) based on Loschiavo, can not be

distinguished. If there is a "corresponding right in the underlying statute" in Lucero as asserted by one respondent (St. Lawrence Br. at n.5), there also has to be one in this case, since it is the same statute and identical regulations. The confusion among the lower courts about the correct test and how to apply it can not be papered over and it needs to be definitively addressed.

II. THIS CASE DOES NOT INVOLVE THE ISSUE WHETHER "A REGULATION ALONE" CAN CREATE A FEDERAL RIGHT.

Respondents continually mis-characterize this case as involving whether a "regulation alone" can create a federal right which is enforceable under Section 1983. The disparate impact regulation here arises in the context of a statute--Section 601--which Congress intended to be enforceable by individuals and to create a federal right, Cannon v. University of Chicago, 441 U.S. 677 (1979); Alexander v. Sandoval, 532 U.S. 275 (2001). The issue is whether the Congressional delegation of authority to create a regulation "effectuating" that existing federal right is sufficient to permit the resulting valid regulations to be enforceable in accordance with Section 1983, or whether Section 1983 enforcement extends only to certain regulatory rights based on some additional test than what is required by the Chrysler and Chevron cases for creating a regulation with "the force of law."

The decision in Sandoval, which did not purport to discuss Section 1983 and its requirements, did not address, much less answer this question. It can not, therefore, compel the decision in this case.

III. THE DECISION BELOW IS NOT CONSISTENT WITH THE PRIOR DECISIONS OF THIS COURT.

Respondents are asking this Court to approve a rule that Congress can not delegate to an administrative agency the creation of a substantive federal right which is enforceable under Section 1983. They are not able, however, to point to any cases of this Court which uphold their assertion that a federal right is created only by a regulation that is interpretative of a right already found in the statute.

By insisting that a regulation can not create a right when the right is not explicit in the underlying statute, respondents and the lower courts are circumscribing the power of Congress to delegate substantive rule making to administrative agencies more narrowly than any case of this Court. Such a rule flies in the face of established precedents enforcing substantive rights which were not in the authorizing statute. See e.g. U.S. v. O'Hagan, 521 U.S. 669 (1997); Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973); Thorpe v. Housing Authority, 393 U.S. 268 (1960); Gemsco v. Walling, 324 U.S. 244 (1945). It would curtail the power of Congress to deal with the complexities and details of modern economic life, with an impact not limited to ending enforcement of the Title VI regulations.[1]

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[1] The extent to which agency regulations, which under traditional theories are valid unless "not at all appropriate to the end specified in the act of Congress" Boske v. Comingore, 177 U.S. 459, 470 (1900), can be denied enforcement under the new requirement that the right be explicit in the underlying statute can be seen, for example, in two Eleventh Circuit cases. In Harris v. James, 127 F.3d 993 (1999) that court denied enforcement of Medicaid regulations which said transportation to and from providers was to be included as a medical service, not by examining whether the

Respondent also has not been able to point to any case law supporting its assertion (St. Lawrence Br. at 21 and fn.13) that there should be a different-and narrower--standard for determining whether regulations have the "force of law" under Section 1983 than under the Supremacy Clause. City of New York v. F.C.C., 486 U.S. 57 (1988); Batterton v. Francis, 432 U.S. 416 (1977); Blum v. Bacon, 457 U.S. 132 (1982); Chrysler Corp v. Brown, 441 U.S. 281 (1979) .[2]

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regulation exceeded the agency's authority under the statute as an "unreasonable" construction of the statute- Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) - but by declaring Congress had not sufficiently specified that right in the statute to be enforceable by aggrieved citizens through Section 1983. In the Kissimmee River case, supra, that court held that a statute making funds available for facilities which "improve the suitability of such waters for recreational boating" does not permit the agency to define "recreational boating" in a manner that requires access for certain classes of power boats at federally financed facilities, at least not for purposes of enforcement under Section 1983. The effect of this standard is that Congress, if it wishes to delegate to the agency to decide what is an appropriate definition of recreational boating, or what is the extent of required medical services, can do so only by sacrificing the enforceability of those rules by the public. Chevron and prior cases have not taken so limited a view of Congressional authority to delegate.

[2] The suggestion at St. Lawrence Br.21-22 that there is not even a sufficient nexus between the disparate impact regulation and the Title VI statutory rights to warrant enforcement under the Chrysler substantive/legislative rule making standard is just another effort to argue that the regulation is invalid, an argument which the Court of Appeals found that respondents had failed to raise or preserve. The Court of Appeals had ample reason to assume that the regulation is valid: In Alexander v. Choate, Justice Marshall wrote on behalf of a unanimous Court, " [In Guardians] the Court held that actions having an unjustified disparate impact on minorities could be redressed through agency regulations designed to implement the

The consequences of having one substantive standard of conduct enforceable by citizens and another substantive standard enforceable by agency action against the same defendants, as advocated by respondents, is so disruptive and unusual that it should not be implemented except in the presence of the clearest Congressional directive, a directive which in the case of Section 1983 is completely absent. Lower courts using this standard are in effect finding a way to not implement regulations they disagree with but which, under Chevron, Chrysler and long-standing doctrines of administrative law, they are not permitted to invalidate. As long as a regulation is "reasonably related to the purposes of the enabling legislation" it does not exceed the delegated authority. Mourning, supra, at 369 (Burger, C.J.). If it does not exceed delegated authority and it creates an individual right on behalf of persons Congress intended the agency to protect it is enforceable under Section 1983 as long as the underlying statute is enforceable under the Blessing v. Freestone test.

IV. RESPONDENTS IGNORE THIS COURT'S DECISIONS PERMITTING REGULATIONS WHICH ARE BROADER THAN THE EXPLICIT RIGHT CONTAINED IN THE STATUTE.

Respondents and the Third Circuit conclude that because the right to be free from unjustified disparate impact that is found in the regulation is not the same right as the right to be free from intentional discrimination that is found in the statute, Congress could not have intended the regulation to be

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purposes of Title VI." 469 U.S. 287, 293 (1985). No court has held to the contrary in the 38 years since the regulations were first enacted.

enforceable by its intended beneficiaries. There is no basis for this conclusion.[3] The authorizing language of Section 602 is sweeping and does not create any special restrictions on the types of regulations agencies could promulgate beyond the limits of Congressional authority to delegate[4]. In addition, the unique requirement of Presidential approval expresses a realization that they would be significant in their impact.

Many decisions of this Court have recognized that agencies are given power to protect the core right created by an Act by regulating and even prohibiting acts outside of that core. In Gemsco, supra, the Administrator was permitted to ban home work in the embroidery industry although its statutory authority was to set minimum wages; in Mourning, supra, the Federal Reserve was permitted to regulate transactions which did not impose a finance charge in order to effectuate regulation of credit transactions; and in U.S. v. O'Hagan, supra, a regulation prohibiting transactions which are not fraudulent was permitted as a "prophylactic measure" under a statute which grants authority to define or prevent fraud. See also, City of Rome v. United States, 446 U.S. 170 (1980) which held that although the Fifteenth Amendment only prohibits purposeful racial discrimination in voting, Congress may implement that right by prohibiting practices that are discriminatory in effect.

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[3] The isolated quotations Respondent St. Lawrence extracts at Br.26 are from the debates and hearing on an early, different version of Title VI, before it included the specific provisions of Section 602 which gives authority for regulations to "effectuate" Section 601 and placed specific restrictions on how administration officials can implement them.

[4] See, Whitman v. American Trucking Associations, et al., 531 U.S. 457, 474 (2001).

Section 601 does not grant immunity for activities which have an unjustified disparate impact; it simply does not, by itself, prohibit such activities. In Guardians five Justices stated that regulations can prohibit such activities, even in light of the determination, reaffirmed that day, that the statute does not reach that far. Thereafter recipients of federal monies could have no doubt that they were accepting the funds subject to the prohibition on unjustified disparate impact imposed by the regulations and Congress appropriately relied on that ruling in determining no corrective action was necessary.

Respectfully submitted,

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